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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL DAVID EGLI,

Defendant - Appellant.

No. 19-4140

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:10-CR-00333-TC-1)

Jessica Stengel, Assistant Federal Public Defender (Scott Keith Wilson, Federal Public Defender; Bretta Pirie, Assistant Federal Public Defender; Natalie Benson, Assistant Federal Public Defender, with her on the briefs), Salt Lake City, Utah, for Defendant-Appellant.

Jennifer P. Williams, Assistant United States Attorney (John W. Huber, United States Attorney, District of Utah, with her on the brief), Salt Lake City, Utah, for Plaintiff-Appellee.

Before **McHUGH**, **EBEL**, and **EID**, Circuit Judges.

EBEL, Circuit Judge.

Daniel David Egli has twice pled guilty to possessing child pornography and has violated his subsequent conditions of supervised release on four occasions by,

among other things, possessing unauthorized computers, engaging in unauthorized Internet usage, and viewing and possessing both adult and child pornography. After the second violation, the district court sentenced Egli to a lifetime of supervised release, and after the fourth violation, it imposed a special condition absolutely prohibiting him from using computers and the Internet. Egli failed to object to that special condition below but now challenges it on appeal.

Reviewing the district court's decision for plain error, we find none. Although our review is hampered by a lack of factual findings below, we find sufficient basis in the record to support the imposition of the Internet ban special condition. Although this Court has previously cautioned that absolute Internet bans are generally invalid, we have left open the possibility of imposing such a ban in a case involving extreme or extraordinary circumstances. Accordingly, and in light of Egli's lengthy history of violating less restrictive conditions of supervised release, we cannot say the district court plainly erred in imposing an absolute ban. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm the district court's imposition of the special condition of supervised release.

I. BACKGROUND

In 2004, Egli pled guilty to possessing child pornography and was sentenced to 51 months' incarceration followed by 60 months' supervised release.[1] The terms of

[1] The government cites to documents from Egli's prior criminal case to establish these facts. Although these documents are not part of the record before us, we take judicial notice of them and grant the motion to take judicial notice. United

Egli's supervised release prohibited him from (1) possessing or using a computer with Internet access without the court's prior written approval, (2) using any data encryption technique or program, and (3) viewing or accessing pornography in any format.

In 2008, Egli violated those supervised-release terms by possessing numerous forms of adult pornography, possessing an unauthorized laptop with Internet access and an unauthorized operating system, utilizing the Internet on his mother's computer, and maintaining two email accounts. For these violations, the court sentenced Egli to 12 months' incarceration followed by 60 months' supervised release. The court imposed the same terms of supervised release as before, with the addition that Egli could not use a computer for any purpose without prior approval from the probation office.

In 2010, two months after his second release from incarceration, Egli again violated his terms of release, this time by possessing an unauthorized laptop computer, various adult pornographic magazines and compact disks, and 14 video files containing child pornography. The United States filed a felony information, and Egli pled guilty to possessing child pornography. The court sentenced Egli to 120 months' incarceration followed by a lifetime term of supervised release. The court again imposed similar terms of supervised release, prohibiting Egli from viewing,

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States v. Duong, 848 F.3d 928, 930 n.3 (10th Cir. 2017) (taking judicial notice of district court filings in a related case).

accessing, or possessing sexually explicit material in any format, and restricting computer and Internet access and use except for approved employment.

In 2018, Egli completed his latest term of incarceration. He reported to the U.S. Probation Office and reviewed the requirements of his supervised release, including the special conditions imposed in 2010. But just six days after his release, probation officers visited Egli's residence and found an Internet-capable Sony PlayStation 3 video-game console and a cell phone with an active Gmail account on it. A week later, Egli admitted to his probation officer that he had recently used his mother's computer to access the Internet more than once, including to view an adult pornographic novel with sexual cartoon images, and to search the chat topic of child pornography on Facebook. Egli provided probation with the password ("iwanttofuck") to his Gmail account linked to his cell phone; review of that account showed that Egli had recently searched the terms "download child pornography" and "child pornography." (R., vol. II, at 28–29 ¶¶ 9–10.) Probation also learned that Egli had paid for, created, and manipulated a "virtual proxy network."[2] (Id. at 29 ¶ 11.)

Based on these supervised-release violations, Egli was taken back into custody, sixteen days after his release from incarceration. The probation office prepared an amended violation report, recommending the re-imposition of the same special conditions of Egli's supervised release in order "to prevent further violation,"

[2] Egli's amended violation report refers to a "virtual proxy network" or "VPN," but our understanding is that VPN commonly refers to a "virtual private network," which is not the same thing as a proxy server. We assume the amended violation report intended to refer to a "virtual private network."

"help reduce the risk of future re-offense and/or violation," and "assist in the sex-offender treatment process." (Id. at 33 ¶ 7.) Probation also noted that restricting access to the Internet "was recommended in [Egli's] original psychosexual examination" from 2004. (Id.)

Egli objected to the re-imposition of the special condition restricting his access to computers and the Internet, arguing that it involved a greater deprivation of liberty than was reasonably necessary and was thus invalid. The government opposed, and the court held a supervised release revocation hearing in June 2019. In response to the parties' arguments, the district court modified the special conditions to allow for employment-related use of a computer and the Internet, and to allow Egli to possess a single personal computer to visit certain benign websites, send emails, and play certain single-player games. The court sentenced Egli to time served and again placed him on supervised release for life.

Per the court's order, Egli was released from custody and sent to reside at a halfway house. The halfway house provided computer access to residents, but did not permit them to possess personal computers. Less than a month after Egli's release from custody, a staff member at the halfway house discovered that Egli was using a work-search computer to visit adult pornographic websites. Computer history logs showed that Egli visited or attempted to visit porntube.com with the search words "mother," "daughter," and "brother." Suppl. R., vol. 1, at 66. Egli had previously been warned on three separate occasions for improper computer use at the halfway house.

A week later, probation officers searched Egli's car and found eight sexually explicit magazines, six sexually explicit DVDs, and one unauthorized and unmonitored laptop computer. These items were hidden under the vehicle's floor mats and car seats, and in the glove compartment. The laptop did not contain any sexually explicit materials and there is no indication that any of the sexually explicit materials contained child pornography.

Egli was again taken back into custody for supervised-release violations. The probation office recommended the same conditions of release, restricting Egli from all Internet access except for third-party employment, but allowing him one personal computer and/or Internet-capable device. The court held a supervised release revocation hearing in September 2019, at which Egli was represented by the same counsel who had represented him at the June 2019 hearing. The court revoked Egli's supervised release and sentenced him to 11 months' imprisonment and another lifetime term of supervised release.

The court then turned to the conditions of supervised release. (These are the conditions at issue in this appeal.) The court read the proposed condition allowing Egli to have one personal computer, then paused and asked the probation officer for clarification on that condition. The probation officer told the court that the personal computer allowance was a mistake. The court then ordered that Egli could not have access to any computers or the Internet, nor engage in any employment that involved Internet access. Although these terms contradicted the terms proposed by the

probation office, the district court did not explain the modification or make any factual findings in support.

At the hearing's conclusion, the court asked Egli's counsel whether she had any questions or concerns and gave her time to speak with Egli. Egli's counsel objected to the lifetime length of supervision but did not object to the Internet-related special conditions. The district court entered a written judgment, imposing the special conditions of supervised release that Egli "shall not access the [I]nternet," "is prohibited from possessing or accessing any [I]nternet capable devices," and "may not be employed in any capacity where he has access to a computer with [I]nternet capabilities." (R., vol. I, at 59.) Egli now challenges those conditions on appeal.

II. DISCUSSION

The government agrees for purposes of this appeal that the district court imposed an absolute Internet ban for the rest of Egli's life. Egli challenges that ban as a violation of 18 U.S.C. § 3583(d)(2), which precludes a district court from imposing a condition of supervised release that involves a "greater deprivation of liberty than is reasonably necessary for the purposes" of deterring criminal activity, protecting the public, and promoting a defendant's rehabilitation. Because Egli did not object on this ground below, his appeal is subject to plain-error review. The government, however, attempts to preclude even that review, arguing that Egli waived—as opposed to forfeited—this challenge below.

In resolving this appeal, we first address the government's waiver argument, concluding that Egli did not intentionally abandon an objection to the special

condition. As a result, Egli's failure to object constitutes forfeiture but not waiver, and we must consider his claim under plain-error review. Under that review, we conclude that the district court did not plainly err because we find a sufficient basis in the record to support imposition of the special condition. Accordingly, we affirm.

A. Egli did not waive appellate review of the special condition.

Egli admits that he did not timely object below to the special condition. Ordinarily, that would mean that he forfeited his objection and could only obtain relief on appeal if he satisfies plain-error review. United States v. Malone, 937 F.3d 1325, 1327 (10th Cir. 2019). Satisfying plain-error review is already a steep climb, but the government wants to make that climb impossible for Egli, arguing that he waived his objection below and thus waived any appellate review. Because there is no evidence that Egli's counsel considered this issue and deliberately abandoned it at the relevant hearing, we conclude that Egli forfeited this issue rather than waived it.

Compared to forfeiture, which results in plain-error review, waiver is a harsher doctrine: a party that has waived an issue is precluded entirely from appellate relief. Id. Waiver comes in two flavors—invited error and abandonment. United States v. Zubia-Torres, 550 F.3d 1202, 1205 (10th Cir. 2008). Here, the government's argument sounds in abandonment. That form of waiver "occurs when a party deliberately considers an issue and makes an intentional decision to forgo it." Malone, 937 F.3d at 1327. This means that mental state matters, as "waiver is accomplished by intent, [but] forfeiture comes about through neglect." United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2007) (alteration in original)

(quoting United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000)). Abandonment requires some evidence that the waiver is knowing and voluntary. Zubia-Torres, 550 F.3d at 1207.

The government asserts that these waiver-by-abandonment standards are satisfied here. For evidence of such intentional abandonment, the government points to the June 2019 revocation hearing in which Egli objected to a proposed blanket Internet ban. The issue was briefed by the parties and discussed at the June 2019 revocation hearing, and the district court decided against a blanket ban. Three months later, at the September 2019 revocation hearing, Egli did not object to the newly imposed blanket ban. The district court asked Egli's counsel whether she had any questions or concerns, and counsel objected to the length of supervision but did not object to the blanket ban. Egli was represented by the same counsel at both hearings.

From those facts, the government would find abandonment. The government sees the June 2019 hearing as proof that Egli "had clearly considered the issue of an [I]nternet ban prior to the final hearing, and made a knowing and voluntary decision at the final hearing not to object." (Aple. Br. 29.) The government concedes that Egli did not affirmatively state that his June 2019 objection to an Internet ban had been resolved, but it argues that such express abandonment is not required. It concludes that the objection in one hearing but not the other proves that Egli deliberately considered the unraised issue and made an intentional decision to forgo it at the September hearing, thus constituting conscious and intentional abandonment.

We think the government's argument stretches the abandonment doctrine beyond its bounds. It is certainly curious that Egli's counsel objected (successfully) at one hearing yet not at the other. But a party does not abandon an objection merely by declining to object when given the opportunity to do so, absent evidence he affirmatively wished to waive the issue. See, e.g., Malone, 937 F.3d at 1327; United States v. Figueroa-Labrada, 720 F.3d 1258, 1264 (10th Cir. 2013); Zubia-Torres, 550 F.3d at 1207. To say otherwise would be to allow waiver to swallow forfeiture. Here, nothing in the record suggests that counsel deliberately considered the absolute-ban issue at the September 2019 hearing—the relevant hearing—and intentionally abandoned it.

The main issue with the government's argument is that it treats two separate hearings on separate violations as one continuous event. Egli raised the Internet-ban issue at the June 2019 revocation hearing addressing supervised-release violations from December 2018. He failed to raise the same objection at the September 2019 revocation hearing addressing supervised-release violations from July and August 2019. Under these circumstances, the raising of an issue in one hearing does not prove its intentional relinquishment in a separate hearing, regarding separate violations, three months later. The government cites no authority supporting its novel theory of abandonment.

Things might be different if this all occurred in one proceeding. For example, in United States v. Gambino-Zavala, cited by the government here, the defendant moved to suppress certain evidence and the government opposed. 539 F.3d 1221,

1227 (10th Cir. 2008). The defendant's attorney did not contest the prosecutor's argument or push the issue any further, seemingly accepting the government's response. This Court held that this was an affirmative abandonment of the issue. Thus, when an objection is raised in a particular proceeding and then abandoned later in that proceeding, this constitutes clear evidence that the objecting party deliberately considered the issue and decided to abandon it. In contrast, that conclusion cannot be drawn based on an objection made at a prior hearing regarding a different matter. Here, Egli's prior objection was never mentioned at all by the parties at the September hearing.

Nor did the district court bring Egli's prior objection to his attention in the September hearing. See Carrasco-Salazar, 494 F.3d at 1273 (finding abandonment where the district court brought a prior objection to the defendant's attention and the defendant affirmatively indicated his prior objection had been resolved). Egli could not have abandoned an issue that was never raised in the relevant proceeding.

Unlike in other cases, nothing here suggests that the failure to object stemmed not from neglect but from a voluntary and intentional decision made at that time. For example, in United States v. Morrison, it was "apparent" that the defendant "did not merely forget to object" to a condition of supervised release but rather "deliberately thought about the argument, used it to argue in favor of a lesser sentence, and then chose not to object to it at the end of sentencing." 771 F.3d 687, 695 (10th Cir. 2014). Here, there is no such evidence of intentional relinquishment because there is no indication that, at the September 2019 hearing, Egli's counsel affirmatively

thought about the objection she had made three months prior and made a conscious choice not to raise it again. Absent such evidence, this Court does not presume a waiver or infer one from a sparse record. See Zubia-Torres, 550 F.3d at 1207.

At bottom, the government's argument merely proves that Egli's counsel thought about the Internet-ban issue prior to and during the June hearing but did not raise it at the September hearing. That speaks to neglect more so than it does intent. And neglect makes more sense: Egli's counsel was successful in her challenge to the blanket ban in the June hearing, as the court modified the proposed conditions to allow Internet access. The government provides no explanation for why Egli's counsel would intentionally abandon that successful argument when a new blanket ban was proposed three months later. Neglect explains the failure to object; intentional abandonment does not.

And such neglect might be explained by the sudden and unexpected imposition of the absolute Internet ban during the September hearing. The probation office had not proposed such a condition, instead proposing the same condition that had been in effect during Egli's previous term of supervised release. At the September hearing, however, the district court sua sponte modified that condition into the absolute Internet ban now before us. Because Egli's counsel was thus not given advance notice that the court was considering an absolute ban, we think counsel's failure to raise the objection off the cuff and three months after the prior objection is somewhat understandable—but, in any event, it was not abandonment.

In sum, we perceive no indication that Egli knowingly and voluntarily abandoned the absolute-ban issue by failing to object in the September hearing. Instead, that failure was the result of neglect, and neglect results in forfeiture, not waiver. Accordingly, we review Egli's appeal under plain error.

B. The district court did not plainly err in imposing the special condition.

Turning to the merits of Egli's claim, we conclude that Egli fails to establish that the district court plainly erred. Although this Court has been hesitant to approve absolute bans on Internet access, we have always acknowledged the possibility that such a ban might be warranted in an extreme case. In light of Egli's glaring history of repeated violations of lesser restrictions on Internet access, we think Egli may well present the extreme case warranting an absolute ban. Accordingly, we affirm.

We will only reverse under plain-error review if the appellant shows (1) an error; (2) the error is plain or obvious; (3) the error affects the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Walser, 275 F.3d 981, 985 (10th Cir. 2001). An error is plain if it is clear or obvious under current, well-settled law. United States v. Ibarra-Diaz, 805 F.3d 908, 929 (10th Cir. 2015). A law is well-settled in the Tenth Circuit if there is precedent directly on point from the Supreme Court or the Tenth Circuit, or if there is a consensus in the other circuits. United States v. Piper, 839 F.3d 1261, 1268 (10th Cir. 2016).

Here, the parties simplify things a bit by narrowing the scope of the dispute to the first two plain-error prongs. Specifically, the government asserts there was no

plain error and that we need not address the third and fourth prongs. By not arguing under these prongs, the government has waived them. United States v. Montes-Ramos, 347 F. App'x 383, 393 (10th Cir. 2009) (unpublished). Thus, the only issue is whether the district court plainly erred by imposing an absolute ban on Internet access as a condition of Egli's supervised release.

A district court's broad discretion to prescribe conditions on supervised release is limited by 18 U.S.C. §§ 3583(d) and 3553(a). United States v. Blair, 933 F.3d 1271, 1275 (10th Cir. 2019). Egli argues that the district court plainly erred by imposing a condition that violated § 3583(d)(2), which requires that supervised-release conditions "'involve no greater deprivation of liberty than is reasonably necessary [for] deterring criminal activity, protecting the public, and promoting a defendant's rehabilitation." Id. at 1279 (quoting § 3583(d)(2)).

Egli's argument is based upon a line of cases in which this Court has addressed conditions of supervised release imposing absolute restrictions on Internet access. Egli points to these cases as evidence that an absolute Internet ban is in clear violation of this Court's well-settled law and thus plain error. Yet contrary to Egli's assertions, these cases do not establish that an absolute Internet ban is always impermissible; instead, they have expressly reserved the possibility that an absolute ban might be warranted in some cases.

To be sure, we have been reluctant to approve of such bans, and we maintain that reluctance here. As we have noted previously, an absolute Internet ban precludes "a means of communication that has become a necessary component of

modern life." United States v. Ullmann, 788 F.3d 1260, 1261 (10th Cir. 2015). Moreover, the propriety of an absolute ban becomes more unlikely with each passing year, as "the role that computers and the Internet play in our everyday lives . . . become[s] even more pronounced." Blair, 933 F.3d at 1277. Now more than ever, the Internet provides "one of the central means of information-gathering and communication in our culture." Walser, 275 F.3d at 988. This has become particularly true over the past year, as many in our society have transitioned to completing even more daily tasks online as a result of the COVID-19 pandemic. Indeed, the oral argument in this very case was conducted remotely via the Internet.

In light of these concerns, we have on several occasions vacated conditions of supervised release for unreasonably impeding upon a defendant's liberty by absolutely prohibiting the use of the Internet. First, in United States v. White, we overturned a special condition that prohibited the defendant from "possess[ing] a computer with Internet access throughout his period of supervised release." 244 F.3d 1199, 1201 (10th Cir. 2001). We deemed that condition unreasonable under the sentencing statutes, because although it was intended to preclude the defendant from viewing sexually explicit material, it was both too narrow (it did not prevent improper computer usage on someone else's computer) and too broad (it prevented benign Internet usage). Id. at 1205–06.

Pointing in the other direction under plain error review is United States v. Walser. In that case, this Court declined to find plain error in a special condition that barred the defendant's "use of or access to the Internet without the prior permission

of the United States Probation officer" for a three-year term. 275 F.3d at 987. Working only with White as our backdrop, we thought the Walser condition "questionable," but we ultimately concluded that our concerns did not "rise[] to the level necessary to clear the extremely high hurdle set by the plain error standard." Id. at 988.

More than a decade later, we revisited the topic in United States v. Ullmann, reviewing for an abuse of discretion a condition of release that allowed the defendant to use computers and the Internet so long as he "abide[d] the policies of the United States Probation Officer's Computer and Internet Monitoring Program which include[d] restrictions and/or prohibitions related to: computer and Internet usage." 788 F.3d at 1262. In considering this condition, we reiterated our holding in White that any "ambiguously-worded condition would impose a greater deprivation of liberty than is reasonably necessary if it were read to completely prohibit a defendant from accessing the Internet." Id. at 1263. Ultimately, however, we upheld the Ullmann condition as lawful because we were persuaded that in effect the condition would act only as a restriction—not a prohibition—on Ullmann's use of the Internet. Id. at 1262, 1264.

Most recently,[3] in United States v. Blair, we considered a condition that "completely ban[ned] Blair's use of the Internet and offline computers, unless and

[3] Following Ullmann, we additionally touched upon this subject in an unpublished case, United States v. Davis, 622 F. App'x 758 (10th Cir. 2015). There, the district court imposed a special condition forbidding all Internet access, but the defendant did not object and did not adequately brief the plain-error test on appeal.

until the probation office ma[de] some future exceptions to the ban." 933 F.3d at 1277. We found it "clear from our published cases" that such a condition was unlawful "because it does not ensure that the defendant will be allowed any reasonable use of computers and the Internet" and because "[n]othing about th[e] case suggest[ed] that a complete ban on Blair's use of the Internet [was] necessary to achieve the goals of supervised release." Id. at 1275, 1280.

At first glance, these cases offer some support for Egli's assertion that an absolute Internet ban is always unlawful. Yet, as the government points out, we have never taken quite so strong a position. Instead, we have been careful to maintain the possibility that a future case might warrant an absolute ban. First, in White, in providing directions for the district court upon remand, we said that "if the court instead chooses to prohibit Mr. White's using any computer, we must caution against this broad sweep under the facts and circumstances here." 244 F.3d at 1207. This left open the possibility that a complete prohibition might be warranted under different facts and circumstances.

Similarly, in Ullmann, we held only that a blanket ban "will typically" violate § 3583(d)(2), and we noted that "[n]o extraordinary circumstances justify such a blanket ban in this case." 788 F.3d at 1261, 1263. Blair repeated the same conclusion, holding that "in all but the most extreme cases, a special condition of

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Id. at 759. We would have affirmed based on the defendant's failure to make his case, but the government conceded that the absolute Internet ban was plain error. The government makes no such concession here.

supervised release that absolutely prohibits the use of the Internet will unreasonably impede a defendant's liberty in violation of section 3583." 933 F.3d at 1277; accord id. at 1281 n.6 ("No one has argued in this case nor did the district court find that extraordinary circumstances exist to justify such a blanket or total ban.").

Here, the government relies upon that language to assert that Egli's case is the extreme case warranting an absolute ban, such that the blanket ban was not error, let alone plain error. Because we agree that Egli's case might very well present the rare case warranting an absolute ban, we hold that the district court did not plainly err by imposing that ban. Although we maintain our concern over such a harsh restriction, as in Walser, "w[e] are not persuaded this concern rises to the level necessary to clear the extremely high hurdle set by the plain error standard." 275 F.3d at 988.

Egli disputes that his case is extreme, comparing his criminal activity to that of prior defendants and arguing that this Court and others have rejected absolute Internet bans for defendants guilty of more egregious conduct. True enough, Egli's underlying criminal conduct could be considered less extreme than the defendants' conduct in cases we have previously considered. In Blair, the defendant possessed more than 700,000 child pornography images and the district court applied a sentencing enhancement based on "very credible" allegations that the defendant had sexually abused his younger sister and his son when they were minors. 933 F.3d at 1272–73. In Ullmann, the defendant engaged in sexually explicit written conversations online with an undercover FBI agent posing as a thirteen-year-old.

788 F.3d at 1261. In each case, we deemed the defendant's conduct not sufficient to warrant a blanket ban.

Egli argues his conduct is less egregious than the conduct in Ullmann. Egli would have us employ a rule where more restrictive Internet conditions are warranted only where the defendant makes "outbound use of the Internet to initiate and facilitate victimization of children." (Reply Br. 8 (quoting United States v. Johnson, 446 F.3d 272, 283 (2d Cir. 2006)).)

However, Egli's argument fails to appreciate his history of supervised-release violations. As described above, Egli has violated his terms of supervised release on four separate occasions, including two recent violations approximately one month apart, only one month following Egli's second release from incarceration. Not until the fourth set of supervised-release violations did the district court impose the blanket ban. None of the cases cited by Egli involve circumstances where the defendant had such a demonstrated inability to abide by lesser Internet restrictions.

As the government argues, "Egli has proven himself repeatedly unwilling or unable to refrain from possessing and using unauthorized computers and the Internet to view adult and child pornography." (Aple. Br. 39.) We think that the requisite extremeness might be met here based upon the record reflecting that all other less restrictive means have not worked and no better alternatives to an absolute ban remain. The district court has tried everything but a total ban and all else has failed. The court need not continue to impose the same futile half measures. Accordingly,

based on Egli's psychosexual evaluation,[4] two convictions for possessing child pornography, and four violations of lesser restrictions on computer and Internet usage, we cannot say the district court plainly erred in imposing the absolute ban, because Egli's case might be extreme enough to warrant such a ban.

Our ability to reach that conclusion is hindered by the district court's failure to make factual findings to support the blanket ban. That failure was error. "[B]efore a district court can impose upon a defendant a special condition of supervised release, the district court must analyze and generally explain how, with regard to the specific defendant being sentenced, the special condition furthers the three statutory requirements set out in 18 U.S.C. § 3583(d)." United States v. Koch, 978 F.3d 719, 725 (10th Cir. 2020); accord United States v. Dunn, 777 F.3d 1171, 1178 (10th Cir. 2015). Although the district court made no such factual findings here, Egli failed to challenge the lack of findings in his opening brief. In his reply brief, Egli noted the lack of findings but acknowledged that he could not now raise that issue. (Reply Br. 17 n.7.) Accordingly, Egli has waived any such argument.[5]

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[4] A 2017 psychosexual evaluation indicated that Egli's "sexual arousal patterns demonstrated a need for intensive psycho-therapy and careful supervision," and that "his response to therapy may be poor." (Suppl. R., vol. 1, at 6–7.) The government describes the evaluation as "pointing to a rising threshold of tolerance to risk and deviance and suggesting that Egli would be at a high risk of re-offending." (Aple. Br. 39.)

[5] Because an absolute Internet ban is such an extreme restriction, we think it calls for extraordinarily careful review and adequately explained supporting findings. But even if we ignored Egli's waiver on this issue, we would only review the lack of factual findings under plain-error review. And under that review, we would vacate the absolute Internet ban "only if the record reveals no basis for" that condition. Koch, 978 F.3d at 729. Because we conclude above that there is a record basis for

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In sum, we conclude that Egli fails to establish that the district court plainly erred by imposing the absolute Internet ban special condition.[6] Tenth Circuit precedent expressly reserves the possibility of an extreme case warranting such a ban, and we think Egli might present such a case. Because we find a record basis to support the imposition of the absolute ban, we cannot say that the district court plainly erred.

III. CONCLUSION

For the reasons provided above, we affirm the district court's imposition of the special condition of supervised release.

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the condition, we conclude as well that "there is no reasonable probability that but for the [court's failure to make factual findings] the defendant's sentence would be different and thus the proceeding's fairness was not impacted." Id. (quoting United States v. Francis, 891 F.3d 888, 898 (10th Cir. 2018)).

[6] Egli describes the ban as an absolute, lifetime Internet ban. We acknowledge that Egli is on a lifetime term of supervised release, but we note that Egli remains able to petition the district court for a modification or reduction of his conditions of supervised release. 18 U.S.C. § 3583(e)(2).